No. 85-445 (2)

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETER DEFAZIO, ET AL.,

PETITIONERS,

V.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, ET AL.

RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF SPRINGFIELD, ACTING BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

The Petition for Certiorari sets forth the parties to this proceeding. This Brief in Opposition to Petition for Certiorari is submitted by the City of Springfield, Oregon, acting by and through the Springfield Utility Board, which is a respondent herein and was a respondent below. This respondent does not have any subsidiaries or other affiliates.

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STATEMENT OF THE CASE

On November 15, 1982, the City of Springfield, Oregon, acting by and through the Springfield Utility Board ("Springfield"), filed a declaratory judgment suit for the limited purpose of determining the validity of certain contracts entered into between the Board, the Bonneville Power Administration ("BPA") and the Washington Public Power Supply System ("Supply System") for power from Supply System Nuclear Projects Nos. 1, 2 and 3.[1/] These three-party agreements are known as "net billing agree-

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1/ Springfield also requested a declaration as to the validity of a separate agreement executed by Springfield, BPA and certain other Northwest utilities providing for the construction and operation of a fourth nuclear plant, the Trojan Nuclear Power Project, located in the state of Oregon.

ments." Believing that they were "interested" parties within the meaning of 28 U.S.C. § 2201(a), Springfield joined as defendants all public and private utility participants which had executed similar or identical agreements. These included BPA, the Supply System, four investor-owned utilities, and over 100 Northwest public utilities.

Springfield filed its complaint after an Oregon state trial court had invalidated Springfield's execution of a separate contract (known as the "participants agreement") concerning two additional Supply System nuclear plants, Project Nos. 4 and 5. The aforesaid state court decision had been rendered in October, 1982 in the case known as Peter DeFazio, et al., v. The Washington Public Power Supply System, et al., Lane County Civ. No. 16-81-11344 (filed December 21, 1981).

The participants agreements differed materially from the net-billing agreements in that they embodied two-party agreements between the respective Northwest utilities and the Supply System, and did not include BPA as a contracting party. Nonetheless, because the participants agreements invalidated by the state trial court on authority grounds contained similar language to the net billing agreements, and further because of the potential personal liability of the individual Springfield Board members under Oregon law for entering into contracts found to be ultra vires, Springfield filed the within declaratory suit.

The petitioners herein, individual ratepayers residing in the City of Springfield, Oregon, requested and received leave to intervene in the declaratory suit after the district court had established an expedited trial schedule, and after

numerous answers and motions to dismiss had been filed. Pet. App. 3-C. Most of these same petitioners were also plaintiffs of record in the aforesaid DeFazio state court lawsuit. As articulated in their moving papers, the petitioners' purpose for intervening in the within declaratory suit was to prevent this case from impairing the favorable decision they had just obtained in the Oregon trial court.

Following the filing of briefs and scheduling of oral argument, the district court entered summary judgment sustaining the validity of the net billing agreements on May 16, 1983. Pet. App. 4-5E. Petitioners' counsel had been present when the various schedules were established by the district court. Following the rendition of summary judgment, the petitioner ratepayers and two Washington public

utility districts [2/] perfected an appeal with the Ninth Circuit Court of Appeals. Significantly, these same Washington PUDs chose not to join the ratepayers in their petition to this Court.

Prior to the affirmance by the Ninth Circuit Court of Appeals of the district court's award of summary judgment (Pet. App. 1-2A) in May of 1985, the Oregon Supreme Court reversed the aforesaid state trial court decision in the case of DeFazio v. Washington Public Power Supply System, et al., 296 Or. 550, 679 P.2d 1316 (1984). On numerous grounds, the Oregon Court held that Springfield and the other Oregon parties to the Project 4/5 participants agreements were in fact authorized under the applicable constitutional, charter and statutory provisions to have

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2/ Mason County PUD No. 3 and Lewis County PUD No. 1.

executed those agreements in 1976. As is discussed below, the rendering of this decision effectively eliminated any colorable authority challenge the Springfield ratepayers may ever have had to Springfield's net billed contracts.

REASONS FOR DENYING THE WRIT

1. Finding ample support in borrowed state law, the Ninth Circuit Court of Appeals agreed with the result reached by the district court that Springfield and the other utility participants to the net billing agreements had full legal authority to execute them. 752 F.2d at 1429. This conclusion was compelled by the court's interpretation of the unambiguous terms of the net billing agreements as constituting power sales contracts (that is, that the utilities pay only for power they receive), which conclusion itself was compelled by the threshold finding that

BPA bore the so-called "dry hole risk" associated with the construction of these projects.

The petitioners at bar contend that had the district court considered additional documentary evidence associated with the net billing agreements (namely, the bond resolutions), it may have construed those agreements otherwise, with the ultimate result under state law that the agreements would be invalid as to certain participants. Pet. at 8-9.[3/] For the reasons that petitioners' arguments lack substance, and petitioners themselves lack standing to raise them, this Court should deny the petition.

3/ Petitioners also argue that a "case or controversy" within the meaning of Article III of the Constitution was not before the district court in this matter. Springfield contends that the record contains ample evidence of a requisite case or controversy and petitioners' contention in this regard is clearly without merit.

2. Other than reciting a series of "what if" scenarios, petitioners offer no specific explanation of how the presence of the subject bond resolutions in the trial court record would have compelled a different result in that court on the basic authority issue. Since the utilities were contractually obligated to pay only for power they received from BPA, the courts below correctly construed these agreements as power sales contracts. Indeed, those courts relied exclusively on the contractual role played by BPA in these agreements in reaching that conclusion. Manifestly, nothing in the bond resolutions diminishes BPA's role in the contracts, and petitioners have not so argued.

In addition, the changes in the judicial landscape since these same petitioners first joined the suit have placed them in a decidedly incongruous position

before this Court. Indeed, petitioners raise no authority arguments under Oregon state or local law, and instead advance authority claims which might have been legitimately raised only by the two Washington utilities which appealed the district court decision. No such petition by these utilities has been filed.

3. Whatever standing Springfield ratepayers might have to challenge a contract entered into between Springfield and other parties must arise out of and reasonably relate to that contract -- not the contracts of other parties.

> "Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. E.g., Tileston v. Ullman, 318 U.S. 44, 87 L. Ed. 603, 63 S. Ct. 493 (1943) . . . .

> Without such limitations -- closely related to Art. III concerns but essentially matters of judicial self-governance -- the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." (Citation omitted). (Emphasis supplied). Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 355, 95 S. Ct. 2197 (1975).

Under the prevailing law of Oregon, Springfield's net billing agreement is immune from challenge on authority grounds. Since the Supreme Court in Defazio v. Washington Public Power Supply System, supra, held that Springfield had authority to execute the participants agreement regarding Projects 4 and 5 -- to which BPA was not a party -- then a fortiori, Springfield had authority to execute the net billing agreements to which BPA was a party. Indeed, the petitioners have not argued to the

contrary. Instead, petitioners suggest that if the net billing agreements were ruled invalid as to Washington and Idaho participants, 4/ then all participants "may" have a claim to be released from their respective net billing agreements. Pet. at 9.

In sum, the petitioner ratepayers are inappropriately advancing contract claims of parties which have themselves rejected such a challenge.

4/ See Chemical Bank v. WPPSS, et al., 99 Wash. 2d 772, 666 P.2d 329 (1983); Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983). Petitioners' reliance on these decisions is misplaced. Both the Washington and Idaho Supreme Courts, in voiding the 4/5 participants agreements as to certain Washington and Idaho participants on authority grounds, expressly noted significant differences between those agreements and the net billing agreements at bar. See Chemical Bank v. WPPSS, supra, 666 P.2d at 332-333; Asson v. City of Burley, supra, 670 P.2d at 844.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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